86-714

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

RODNEY P. WESTFALL, ET AL., PETITIONERS

v.

WILLIAM T. ERWIN, SR., AND EMELY ERWIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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36 pp

QUESTION PRESENTED

Whether the immunity recognized in *Barr* v. *Matteo*, 360 U.S. 564 (1959), protects petitioners—federal employees sued in their individual capacities—from liability under state tort law for injuries allegedly caused by their official acts.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Osburn Rutledge and William Bell were defendants in the district court and are petitioners in this Court.

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The Solicitor General, on behalf of Rodney P. Westfall, Osburn Rutledge, and William Bell, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-3a) is reported at 785 F.2d 1551. The opinion of the district court (App., *infra*, 4a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 8a-9a) was entered on April 8, 1986. A petition for rehearing was denied on June 2, 1986 (App., *infra*, 10a-11a). On August 20, 1986, Justice Powell issued an order extending the time for filing a petition for a writ of certiorari to and including September 30, 1986; on September 22, 1986, Justice Powell issued an order further extending the time within which to file a petition to and including October 30, 1986. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

1. This is a state law tort action in which respondents seek monetary damages from petitioners, all of whom are federal employees, for injuries allegedly caused by conduct that was within the scope of petitioners' official duties. Respondent William T. Erwin, Sr., is employed by the federal government as a civilian warehouseman at the Anniston Army Depot in Anniston, Alabama. He asserts that he was injured on February 9, 1984, when he "picked up a bag of soda ash and inhaled some of the soda ash dust that had spilled from the bag" (Erwin Affidavit filed June 4, 1985, at 1). He claims that as a result of his contact with the soda ash he sustained chemical burns in his eyes and throat that caused permanent injury to his vocal chords and impairment of his ability to speak (*ibid.*; Complaint at 4).

William Erwin and his wife, respondent Emely Erwin, subsequently commenced this action in Alabama state court. The complaint alleged that "bags or containers of soda ash were improperly and negligently stored at [William Erwin's] workplace," that "such bags or containers were negligently designed or manufactured or alternatively, that the manufacturers or distributors of such bags issued inadequate warnings concerning their use and storage" (Complaint at 3). William Erwin stated in a subsequently filed affidavit that "[t]he soda ash that I inhaled was improperly stored and should not have been routed to the warehouse where I was working. Further, someone should have known that it was there and provided me with some warning as to its presence and danger before I inhaled it" (Erwin Affidavit at 1).

Petitioners, three federal employees who are supervisors at the Anniston Depot, are named as defendants in the complaint.[1] The complaint also lists as defendants 21 un-

[1] Petitioner Rodney P. Westfall is the chief of the Receiving Section at the Depot, Osburn Rutledge is the chief of the Breakdown and Bulk

named individuals or entities (Complaint at 1-3). William Erwin seeks damages in the amount of $500,000; Emely Erwin seeks $25,000 in damages for loss of consortium (*id.* at 4, 5).

Petitioners removed the action to the United States District Court for the Northern District of Alabama pursuant to 28 U.S.C. 1442(a)(1); they filed a motion to dismiss or, in the alternative, for summary judgment on the ground that they were absolutely immune from suit. Respondents opposed the motion, asserting that a federal employee is entitled to immunity from tort liability only if the employee is engaged in policymaking activities. William Erwin filed an affidavit stating that petitioners "are not involved in any policy-making work for the United States Government. Their job duties are similar to mine, with the addition of their supervisory responsibilities. Therefore, [i]t is my understanding that their duties only require them to follow established procedures and guidelines. We all work at the operational level of the United States Government and are not at the policy and planning level" (Erwin Affidavit at 2).

The district court granted the motion and dismissed the action against petitioners (App., *infra*, 4a-7a). The court first observed that petitioners' motion was accompanied by an affidavit stating that they were "acting under color of their office and within the scope of their official duties at the time of the acts or omissions made the basis of" respondents' tort claims; the court noted that respondents did not dispute those facts (*id.* at 5a). Relying upon *Johns* v. *Pettibone Corp.*, 755 F.2d 1484 (11th Cir. 1985), the district court stated that "[t]he law of the Eleventh Circuit is clear that * * * any federal employee is entitled to absolute immunity for ordinary torts committed within the

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Delivery Unit, and William Bell is the chief of Unloading Unit No. 1 (Fomby Affidavit filed March 4, 1985, at 1).

scope of their jobs"; it held that petitioners accordingly were "absolutely immune from suit on account of the matters alleged in the complaint" (*id.* at 5a).

2. The court of appeals reversed (App., *infra*, 1a-3a). It observed that "the opinion [in *Johns* v. *Pettibone Corp.*, *supra*] relied on by the district court was subsequently withdrawn" (*id.* at 2a). The revised opinion "establishes the rule that 'a government employee enjoys immunity only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the actor's line of duty' " (*id.* at 3a, quoting *Johns* v. *Pettibone Corp.*, 769 F.2d 724, 728 (11th Cir. 1985) (emphasis in original; citation omitted)).

The court of appeals stated that the district court in the present case "erred as a matter of law in applying only one part of the immunity test—whether the act was in the scope of the employees' duties—without determining whether the challenged conduct was or was not discretionary" (App., *infra*, 3a). Finding that respondents had "alleged undisputed facts sufficient to create a material question of whether or not [petitioners'] complained-of acts were discretionary," the court reversed the grant of summary judgment and remanded the action for further proceedings (*ibid.*). Although the court of appeals did not define the term "discretion" in its decision in the present case, another panel of the Eleventh Circuit subsequently stated that " 'discretionary acts' involve planning or policy considerations and do not concern day to day operations" (*Heathcoat* v. *Potts*, 790 F.2d 1540, 1542 (11th Cir. 1986) (citation omitted)).

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the extent to which federal employees are subject to personal liability for their official acts. The Court held in *Barr* v. *Matteo*, 360 U.S. 564 (1959), that a federal employee was absolutely immune from tort liability for damage allegedly

caused by conduct within the scope of his official duties. In recent years, the courts of appeals have developed a bewildering variety of standards to determine when a federal employee is protected from tort liability by the immunity principle recognized in *Barr*. One circuit has clearly adopted the view that all federal employees are immune from common law tort liability for their official acts, and many decisions from a number of appellate courts have used language consistent with that conclusion. Some circuits have restricted immunity to employees who exercise discretion, but they have defined that limitation in quite different ways. Thus, some courts classify only policymaking as discretionary, others include both policymaking and operational activities, and still others utilize a general inquiry under which the employee's entitlement to immunity depends upon the facts of each particular case.

In defining the scope of government employees' immunity from personal liability for constitutional violations, this Court has recognized that "officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated" (*Davis* v. *Scherer*, 468 U.S. 183, 195 (1984)). Here too, immunity can insulate federal employees from the threat of litigation, and thereby promote "the effective functioning of government" (*Barr*, 360 U.S. at 573), only if employees know in advance that they will not be subject to tort liability for their official acts. Under the present confused state of the law, however, federal employees cannot determine whether they will be protected from monetary liability in the event they are forced to defend their official actions in a state law tort suit. Since the differing approaches of the courts of appeals thus thwart the accomplishment of the very purpose that immunity is designed to promote, review by this Court is plainly warranted.[2]

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[2] The Court has recognized that the question presented in this case—the scope of federal officials' immunity from liability under

1. There is a sharp conflict among the courts of appeals with respect to the scope of federal employees' immunity from liability in state law tort actions. The Eighth Circuit recently concluded that every federal employee is absolutely immune from common law tort liability for his official acts, regardless of whether the employee exercises ministerial or discretionary authority. *Poolman* v. *Nelson*, No. 85-5401 (8th Cir. Sept. 30, 1986), slip op. 4-7.[3] The First Circuit has intimated an inclination to reach the same conclusion, observing that this Court "has not yet put its imprimatur upon a 'ministerial duty' exception to absolute immunity" (*Ricci* v. *Key Bancshares of Maine, Inc.*, 768 F.2d 456, 464 (1st Cir. 1985)).

Six courts of appeals have concluded that immunity from tort liability is available only to federal employees who perform "discretionary" activities; employees engaged in "ministerial" activities are not accorded any immunity. But these courts disagree among themselves with respect to the quantum of discretion that entitles an employee to immunity. The rule applied by the Third, Tenth, and Eleventh Circuits is that the federal employee must exercise policymaking authority. *Heathcoat* v. *Potts*, 790 F.2d 1540, 1542 (11th Cir. 1986) (immunity is available only for "discretionary acts," which are those

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state tort law—is wholly separate from the scope of these officials' immunity from liability for constitutional violations. *Butz* v. *Economou*, 438 U.S. 478, 495 (1978). Thus, even though certain general principles are relevant in both contexts, the Court's decision in this case will not affect the standard for immunity from liability for constitutional violations established in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), and its progeny.

[3] The court observed that "the discretionary or ministerial nature of an activity" may be relevant in determining whether an official's acts were within the scope of his authority, noting that "th[e] outer perimeter [of this authority] fluctuates in relation to the degree of discretionary authority afforded an official" (*Poolman*, slip op. 6).

acts that "involve planning or policy considerations and do not concern day to day operations"); *Araujo* v. *Welch*, 742 F.2d 802, 804 (3d Cir. 1984) (" 'immunity protects officers from liability only for actions having a policy-making or judgmental element' ") (citation omitted); *Jackson* v. *Kelly*, 557 F.2d 735, 737-738 (10th Cir. 1977) (en banc) ("a duty is discretionary if it involves judgment, planning or policy decisions. It is not discretionary if it involves enforcement or administration of a mandatory duty at the operational level, even if professional expert evaluation is required").

The Fifth and District of Columbia Circuits follow a different immunity rule, applying an ad hoc functional analysis to determine whether the federal employee exercises sufficient discretion to warrant a grant of immunity. They "measure whether judicial scrutiny of a disputed official act might inhibit official policymaking and thus unduly interfere with the efficient operation of government." *Gray* v. *Bell*, 712 F.2d 490, 505-506 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984); see also *Norton* v. *McShane*, 332 F.2d 855, 859 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965). These two courts do not apply this standard in an identical manner. Compare, *e.g.*, *Dretar* v. *Smith*, 752 F.2d 1015 (5th Cir. 1985) (supervisor immune in tort action in which subordinate sought damages for alleged battery) with *McKinney* v. *Whitfield*, 736 F.2d 766 (D.C. Cir. 1984) (supervisor not entitled to immunity in similar situation).

The Sixth Circuit utilizes a broad definition of discretion, conferring immunity upon federal employees who exercise discretion at the operational level as well upon employees who formulate policy. *Granger* v. *Marek*, 583 F.2d 781 (6th Cir. 1978) (Internal Revenue Service agents); *Estate of Burks* v. *Ross*, 438 F.2d 230, 234 (6th Cir. 1971) (hospital administrator and doctor exercise discretionary authority and therefore are entitled to immunity; nurses

not immune because they perform ministerial functions). The First Circuit, which has assumed without deciding that an employee must exercise discretion in order to obtain immunity, also defines discretion in this manner. *Ricci* v. *Key Bancshares of Maine, Inc.*, 768 F.2d at 464-465 (conduct of FBI agents in the course of an investigation).

The law is unsettled in the remaining courts of appeals. The Seventh Circuit has rejected the ministerial/discretionary distinction and stated that immunity might be limited to federal employees engaged in policymaking. *Lojuk* v. *Johnson*, 770 F.2d 619, 626-628 (7th Cir. 1985), cert. denied, No. 85-5782 (Jan. 13, 1986); but see *Carson* v. *Block*, 790 F.2d 562, 564 (7th Cir. 1986) (intimating that all federal employees are entitled to immunity); *Oyler* v. *National Guard Ass'n*, 743 F.2d 545, 552-553 (7th Cir. 1984) (rejecting argument that immunity extends only to policymakers).

Some panels of the Second, Fourth, and Ninth Circuits have indicated that a federal employee's entitlement to immunity turns upon whether the employee exercises discretion. See *Huntington Towers, Ltd.* v. *Franklin National Bank*, 559 F.2d 863, 870 (2d Cir. 1977), cert. denied, 434 U.S. 1012 (1978); *George* v. *Kay*, 632 F.2d 1103, 1105 (4th Cir. 1980), cert. denied, 450 U.S. 1029 (1981); *Green* v. *James*, 473 F.2d 660, 661 (9th Cir. 1973). However, more recent decisions of these courts have not reiterated the discretion requirement. See *Wyler* v. *United States*, 725 F.2d 156, 159 (2d Cir. 1983); *Sprecher* v. *Graber*, 716 F.2d 968, 975 (2d Cir. 1983); *Wallen* v. *Domm*, 700 F.2d 124, 125 (4th Cir. 1983); *Augustine* v. *McDonald*, 770 F.2d 1442, 1446 (9th Cir. 1985); *Miller* v. *DeLaune*, 602 F.2d 198, 200 (9th Cir. 1979). In any event, these courts' decisions indicate that if a showing of discretion is required, the applicable standard is the broad definition of discretion utilized by the First and Sixth Circuits. See, *e.g.*,

Wyler v. *United States, supra* (actions of Drug Enforcement Administration agents in performing their law enforcement responsibilities); *Wallen* v. *Domm, supra* (actions of supervisor); *Augustine* v. *McDonald, supra* (actions of government attorneys in garnishing the plaintiff's assets to satisfy judgments in favor of the United States).

The large number of recent appellate decisions addressing the question presented in this case is a reflection of the increasing frequency with which plaintiffs are utilizing actions under state tort law to challenge the official conduct of federal employees. A growing number of federal employees therefore face personal liability for their official acts, a circumstance that—together with the confusion about the proper scope of immunity—tends to inhibit the vigorous exercise of government authority, the very result that immunity is designed to prevent. Clarification by this Court of the standard governing official immunity from tort liability is necessary in order to eliminate this threat to the effective functioning of government.[4]

2. Moreover, the court of appeals' decision is incorrect. Petitioners are immune from tort liability in this case.[5]

a. This Court's first comprehensive discussion of the scope of federal employees' immunity from tort liability appears in its decision in *Spalding* v. *Vilas,* 161 U.S. 483 (1896). The plaintiff in that case sought money damages from the Postmaster General, asserting that the Postmaster General had issued a circular containing false

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[4] Three Members of the Court previously recognized the existence of differing approaches to the immunity issue. See *Martinez* v. *Shrock*, cert. denied, 430 U.S. 920 (1977) (White, J., joined by Brennan and Marshall, JJ., dissenting).

[5] The Court has made clear that a federal employee's entitlement to immunity from tort liability for his official acts is "judged by federal standards, to be formulated by the courts in the absence of legislative action by Congress" (*Howard* v. *Lyons,* 360 U.S. 593, 597 (1959)).

statements in an effort to injure the plaintiff. This Court found that the Postmaster General's conduct was within the scope of his official duties and held that he was immune from liability even if he had acted with malice. The Court stated that (161 U.S. at 498-499)

> [i]n exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.

The Court again addressed this immunity question in *Barr* v. *Matteo,* 360 U.S. 564 (1959). *Barr* was a libel action brought by former employees of the federal Office of Rent Stabilization against the acting director of that office. The plaintiffs alleged that they had been defamed by a press release issued by the acting director; this Court held that the acting director was immune from suit. A plurality of four Justices concluded that "the principle announced in *Vilas* can [not] properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts" (360 U.S. at 572 (footnote omitted)). It found that "[t]he privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government" (*id.* at 572-573), and concluded that the privilege was available to "officers of lower rank in the executive hierarchy" (*id.* at 573).

The plurality stated that it is "the duties with which the particular officer * * * is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,'—which must provide the guide in delineating the scope of the rule which clothes the official

acts of the executive officer with immunity from civil defamation suits" (360 U.S. at 573-574) (citation omitted)). It found that "[t]he fact that the action here taken [by the defendant] was within the outer perimeter of [his] line of duty is enough to render the privilege applicable" (*id.* at 575).[6]

Barr was the last decision in which this Court squarely addressed the scope of federal employees' immunity from non-constitutional tort liability.[7] The courts of appeals

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[6] Justice Black concurred in the result in *Barr*, emphasizing the importance of federal employees' freedom to communicate with the public (360 U.S. at 576-578). Justice Stewart agreed with the plurality's analysis of the standard governing the availability of immunity, but concluded that the defendant was not entitled to immunity because he was not acting within the scope of his official duties (*id.* at 592). Three Justices dissented because they disagreed with the plurality's conclusion regarding the scope of immunity (*id.* at 578-592).

[7] In *Doe* v. *McMillan*, 412 U.S. 306 (1973), the Court considered whether the Public Printer and the Superintendent of Documents were entitled to immunity in an action in which the plaintiffs sought damages for both constitutional violations and common law torts allegedly committed by these officials in connection with the production and distribution of a congressional committee's report. The Court concluded that these officials did not have "an independent immunity," but instead were immune from damages liability to the extent that employees of the government entity for which they performed printing services would have been entitled to immunity in connection with the production and distribution of the printed material; the officials' immunity in *Doe* therefore turned upon the scope of legislative immunity (412 U.S. at 323).

The Court in *Doe* did discuss *Barr* and at one point stated that "[j]udges, like executive officers with discretionary functions, have been held absolutely immune regardless of their motive or good faith. But policemen and like officials apparently enjoy a more limited privilege" (412 U.S. at 319 (citations omitted)). However, the Court did not indicate whether this statement referred to immunity from constitutional claims or immunity from tort claims; indeed, it supported the reference to a "more limited privilege" by citing *Pierson* v.

uniformly have concluded that the immunity recognized in *Barr* is available to federal employees in connection with all types of state law tort claims, from negligence actions to actions seeking damages for intentional torts.[8] As we have discussed, the courts of appeals are sharply divided with respect to whether the privilege protects all federal employees as long as they do not exceed the bounds of their governmental authority, or only protects employees in the performance of particular sorts of functions. In our view, federal employees are protected from personal financial liability under state tort law as long as they act within the scope of their official duties. Moreover, even if all federal employees are not protected by immunity, employees who exercise operational discretion—such as the discretion exercised by petitioners in their capacities as supervisors—should be protected by immunity.[9]

Ray, 386 U.S. 547 (1967), a case that addressed a police officer's immunity from liability for violations of the Constitution. In view of this ambiguity, and the fact that limiting the scope of immunity under *Barr* was not necessary—or even relevant—to the ground of decision in *Doe*, the Court's brief reference to the scope of immunity cannot be viewed as announcing a restriction upon official immunity in the common law tort context.

[8] See, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807-808 (1982) (characterizing *Vilas* and *Barr* as according "absolute immunity from suits at common law"); *Norton* v. *McShane*, 332 F.2d at 859-860 & n.5.

[9] Although the standard for which we contend is a rule of absolute immunity, it operates in the context of non-constitutional torts in a manner similar to the qualified immunity standard adopted in *Harlow* v. *Fitzgerald*, *supra*, for constitutional wrongs. In both situations, the immunity rule is designed to protect a federal official from personal liability when his conduct remains within the scope of his governmental authority.

A qualified immunity rule in the absence of a constitutional claim presumably would turn upon the defendant's subjective good faith (see *Barr* v. *Matteo*, 360 U.S. at 586-588 (Brennan, J., dissenting)), but the Court rejected such an approach in *Harlow* on the ground that an immunity standard that depends upon the official's actual state of mind "may entail broad-ranging discovery and the deposing of

b. Although *Barr* itself involved "an official of policy-making rank" (360 U.S. at 575), the plurality in *Barr* plainly did not restrict immunity to federal employees who exercise a particular quantum of discretion.[10] The plurality's only discussion of the fact that the defendant in *Barr* did exercise discretion was in connection with its determination that the challenged conduct was "within the outer perimeter of [his] line of duty" (*ibid.*). Indeed, the plurality took pains to point out that the discretionary nature of the defendant's responsibilities did not *divest* him of the protection of immunity (*ibid.* (emphasis in original; footnote omitted)):

> That [the defendant] was not *required* by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank, for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority.

Barr thus did not restrict immunity to employees who exercise discretion. Accord *Poolman* v. *Nelson*, slip op. 4-7; *Lojuk* v. *Johnson*, 770 F.2d at 626-627; *Ricci* v. *Key Bancshares of Maine, Inc.*, 768 F.2d at 463-464.[11]

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numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government." (457 U.S. at 817 (footnotes omitted)).

[10] The plurality's legal analysis of the scope of immunity is particularly significant because it was adopted by Justice Stewart (360 U.S. at 592) and therefore represented the views of five Members of the Court.

[11] Some courts have seized upon the statement in *Barr* that "the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions" (360 U.S. at 573). But

Further, the policies underlying the decision in *Barr* support a rule immunizing all federal employees from common law tort liability for acts within the scope of their official duties. The *Barr* plurality stated that immunity is designed "to aid in the effective functioning of government" (360 U.S. at 573). Thus, "[i]t has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Id.* at 571; see also *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand. J.), cert. denied, 339 U.S. 949 (1950).[12]

Any federal employee, regardless of his duties, undoubtedly will be affected by the prospect of litigation and personal liability for harms that allegedly result from the performance of his job. Forcing employees to bear these risks must itself have a price, which will necessarily be reflected in either higher wages and salaries for government workers or a reduction in the quality of the federal

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the plurality simply was referring to the fact that the greater the official's authority, the "broader the range of [his] responsibilities and duties," and, therefore, the wider the outer perimeter of his line of duty (*ibid.*). The statement in no way indicates that lower level officials are not protected by immunity.

[12] The rule of immunity adopted in *Barr* also protects against "state interference" with federal officials' execution of their duties under federal law. *Butz* v. *Economou*, 438 U.S. 478, 495 (1978); *Ricci* v. *Key Bancshares of Maine, Inc.*, 768 F.2d at 463; cf. *In re Neagle*, 135 U.S. 1, 61-63 (1890).

workforce.[13] And few if any jobs are so purely ministerial in nature as to leave no room for the shading of decisions and the hedging of conduct to take account of the risk of personal liability.[14] Even if an employee's duties are solely ministerial, moreover, the federal government may bear the loss of productivity due to the time that the employee was required to devote to defending the lawsuit.

These consequences will disrupt the effective functioning of the government whether or not the employee's duties involve the exercise of a particular quantum of discretion. The *Barr* plurality observed that "[t]he complexities and magnitude of government have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy" (360 U.S. at 573 (footnote omitted)). Indeed, a rule restricting immunity to policymakers or some other group of high-level officials

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[13] As one court of appeals recently observed (*Carson* v. *Block*, 790 F.2d at 564),

> [p]rivate firms may buy insurance for their employees, or give them bonuses or shares of the enterprise to induce them to take risks. The United States does not offer [government officials] a "share of the profits" from federal programs * * * and a system under which officials face risks of substantial liability for error without any corresponding prospect of reward for good work is doomed. Only the addled and the foolhardy would disregard these incentives, and the addled and foolhardy do not execute statutes very well.

[14] A ministerial duty is a mandatory duty expressly imposed by and specifically delineated in a statute, regulation, or other directive. See *Davis* v. *Scherer*, 468 U.S. at 197 n.14 ("[a] law that fails to specify the precise action that the official must take in each instance creates only discretionary authority").

would encourage tort plaintiffs seeking monetary damages to focus their efforts upon the vast majority of lower ranking federal employees who are responsible for carrying out the routine day-to-day functions of government. These lower level employees are the individuals least able to shoulder personal monetary liability and, accordingly, the federal employees whose official actions are most likely to be inhibited by the threat of liability.

Perhaps most importantly, restricting immunity to federal employees who exercise discretionary authority undercuts the very purpose that immunity is designed to serve by creating great uncertainty about when and to whom it applies. The fact that an employee ultimately may be found to be entitled to immunity is irrelevant if the employee cannot determine in advance that he will receive that protection. *Davis* v. *Scherer*, 468 U.S. at 195. A rule limiting immunity to acts involving a particular quantum of discretion is simply too vague and uncertain to satisfy this requirement.

This Court has observed in other contexts that a distinction cannot easily be drawn between discretionary and ministerial functions. See *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 811 (1984); *Owen* v. *City of Independence*, 445 U.S. 622, 648 n.31 (1980) (observing with respect to the immunity rule protecting a municipality from tort liability for discretionary acts that "a clear line between the municipality's 'discretionary' and 'ministerial' functions was often hard to discern, a difficulty which has been mirrored in the federal courts' attempts to draw a similar distinction under the Federal Tort Claims Act"). Indeed, one court of appeals candidly has observed that "[a]lmost any wrong can be characterized as discretionary or non-discretionary for purposes of exception from liability under either the FTCA or the common law" (*Sami* v. *United States*, 617 F.2d 755, 771 (D.C. Cir. 1979)). An

immunity rule that turns upon whether an employee exercises discretion would make it difficult for the employee to ascertain in advance whether his conduct was protected by immunity and, therefore, would force the employee to act as if he had no immunity at all. The discretion requirement would thus eviscerate the benefits to the government that the immunity rule is designed to provide. Cf. *Coleman* v. *Frantz*, 754 F.2d 719, 727-728 (7th Cir. 1985).[15]

The rule for which we contend may prevent some plaintiffs from obtaining compensation for their injuries, although the limited financial resources of most federal employees engaged in non-discretionary duties suggest that few plaintiffs lose any genuine opportunity for compensation under a rule of absolute immunity for common law torts. See *Sami* v. *United States*, 617 F.2d at 772.[16] The conclusion of the plurality in *Barr* regarding this point is equally applicable here: "as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a

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[15] A further practical difficulty with a discretion requirement is that discovery may be necessary to determine whether the defendant exercises sufficient discretion to qualify for immunity. See, *e.g.*, *Heathcoat* v. *Potts*, 790 F.2d at 1543 ("detailed but abstract" job descriptions not sufficient; court remanded the case for "a fuller development of the facts" through discovery). When discovery is required to sustain a claim to immunity, it is no longer "an *immunity from suit* rather than a mere defense to liability" (*Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985), slip op. 14 (emphasis in original)). In this case, for example, the court of appeals remanded for further proceedings regarding the immunity issue (App., *infra*, 3a).

[16] Of course, immunity would not necessarily leave the plaintiff without a remedy; compensation may be available from the United States under the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*, or the Federal Tort Claims Act, 28 U.S.C. 1346(b). And federal employees' immunity would, of course, be limited to acts within the scope of their official duties.

necessary one to pay for the greater good. And there are of course other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner" (360 U.S. at 576).[17]

c. Even if the Court disagrees with our submission that immunity should be extended to all federal employees acting within the scope of their duties, and concludes that only employees with discretionary authority are protected by immunity, petitioners exercise sufficient discretion to be entitled to immunity in this case. The basis of respondents' tort claim is that petitioners negligently stored, designed, manufactured, or labeled the soda ash

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[17] This rule of absolute immunity is particularly appropriate, and should at a minimum be recognized, in situations such as the present case where both the plaintiff and the defendant are federal employees and the lawsuit relates to the defendant's execution of his official duties in the employees' common workplace. Suits between employees are especially likely to affect adversely the functioning of the government because they tend to preclude the cooperation among federal employees that is necessary to the successful execution of the employees' official duties. Such actions also may become vehicles for personal vendettas rather than legitimate efforts to obtain compensation for damage incurred by the plaintiff.

Further, Congress expressly established a remedial system for injuries incurred by federal employees in the course of their duties when it enacted the Federal Employees' Compensation Act (FECA). The Act provides for administrative, no-fault compensation for certain injuries incurred by federal employees in the course of their duties. See 5 U.S.C. 8101-8151. The presence of this alternative remedy for many of the injuries that form the basis of co-employee tort actions weighs in favor of the recognition of immunity in this context. (We have been informed by the Department of the Army that William Erwin was reimbursed under the FECA for his medical costs and received disability pay for the period that he was unable to work. He did not receive compensation for the alleged permanent harm to his vocal chords on the ground that the FECA does not authorize compensation for that injury.)

containers. Where and how to store the soda ash and whether warnings should have been given to persons handling the soda ash containers all are questions involving the exercise of discretion in the operation of the Depot warehouse.[18] Since petitioners—if they in fact were responsible for these decisions—were required to exercise discretion, their decisions with respect to these issues must be insulated from the threat of liability.

Respondents' allegations are quite similar to the allegations of the plaintiffs in *Dalehite* v. *United States*, 346 U.S. 15 (1953), that the United States was liable for negligently manufacturing, storing, and labeling a fertilizer that had explosive properties. This Court concluded in that case that recovery was barred by the discretionary function exception to liability under the Federal Tort Claims Act (see 346 U.S. at 38-44). It specifically observed that "acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of [the discretionary function exception] would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion" (*id.* at 36 (footnote omitted)). Petitioners—individual federal officials charged with negligently carrying out similar policies—should be protected from tort liability under the same rationale. Whether petitioners made the relevant discretionary decisions or simply carried out

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[18] In the course of overseeing the operation of the warehouse, petitioners must issue literally hundreds of instructions on a daily basis to the employees of that facility. Petitioners' performance as supervisors plainly would be chilled, and the overall operation of the facility thereby adversely affected, if they were threatened with personal liability in connection with each and every one of these instructions.

discretionary decisions made by others, they should not be subject to personal liability for damage resulting from those actions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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OCTOBER 1986

APPENDIX A

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

No. 85-7437

WILLIAM T. ERWIN, SR., AND EMELY ERWIN,
PLAINTIFFS-APPELLANTS,

v.

RODNEY P. WESTFALL; OSBORN RUTLEDGE;
WILLIAM BELL; ET AL., DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Northern District of Alabama.

[Filed Apr. 8, 1986]

Before JOHNSON and HATCHETT, Circuit Judges, and MURPHY*, District Judge.

PER CURIAM:

This case presents an appeal from the district court's grant of summary judgment on immunity grounds to defendants in a tort suit by a federal employee against co-employees and supervisors. Since summary judgment was granted on the basis of law that has recently changed in this Circuit, we REVERSE and REMAND for reconsideration.

Plaintiff-appellant William T. Erwin, Sr., a warehouseman at the Anniston Army Depot in Anniston, Alabama, was injured on February 9, 1984, by workplace exposure to toxic soda ash. Some of the ash, which was stored in appellant's warehouse, had spilled from its con-

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*Honorable Harold L. Murphy, U.S. District Judge for the Northern District of Georgia, sitting by designation.

tainers. Erwin inhaled a quantity of the ash, allegedly suffering chemical burns to his eyes and throat, permanent injury to his vocal cords, and emotional and mental distress. His co-plaintiff and wife, Emely Erwin, suffered a loss of his consortium.

Charging that his injuries were proximately caused by the negligence of certain co-employees and supervisors, Erwin brought suit in Jefferson County Circuit Court on February 7, 1985. The action was removed to the United States District Court for the Northern District of Alabama on March 25, 1985. That court granted summary judgment to defendants-appellees on June 5, 1985, on the ground that the latter were immune from suit as a matter of law since they were federal employees acting within the scope of their duties when the complained-of negligence occurred.

The district court based its ruling on *Johns v. Pettibone Corp.*, 755 F.2d 1484 (11th Cir.1985) (per curiam). *Pettibone* held that " 'absent an allegation of a tort of constitutional magnitude, federal officials are entitled to absolute immunity for ordinary torts committed within the scope of their jobs.' " *Id.* at 1486 (citations omitted).

Conclusions of law rendered by means of a summary judgment are subject to the same standard of appellate review as any other question of law raised on appeal. *Morrison v. Washington County, Ala.*, 700 F.2d 678, 682 (11th Cir.1983). At the time summary judgment was granted, the district court was correct in ruling as it did under *Pettibone*. However, the opinion relied on by the district court was subsequently withdrawn. A revised opinion appeared at *Johns v. Pettibone*, 769 F.2d 724 (11th Cir.1985) (*Pettibone II*). And portions of that opinion in turn were recently deleted on rehearing in *Johns v. Pettibone*, No. 84-7361, slip op. (11th Cir. Nov. 12, 1985) (per curiam) (*Pettibone III*). By the latter order, this Court also denied a petition for rehearing *en banc*.

Pettibone III establishes the rule that "a government employee enjoys immunity only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the actor's line of duty." *Pettibone III*, slip op. at 527 [769 F.2d at 728]. Thus, in granting summary judgment the district court erred as a matter of law in applying only one part of the immunity test—whether the act was in the scope of the employees' duties—without determining whether the challenged conduct was or was not discretionary.

Appellants' efforts to persuade us to abandon the *Pettibone III* rule are unavailing. It is the law of this Circuit. Plaintiffs have alleged undisputed facts sufficient to create a material question of whether or not defendants' complained-of acts were discretionary. Summary judgment was thus inappropriate.

Accordingly, we REVERSE and REMAND for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CV85-H-874-S

WILLIAM T. ERWIN, SR., AND EMELY ERWIN, PLAINTIFFS,

v.

RODNEY P. WESTFALL; OSBORN RUTLEDGE; WILLIAM BELL; ET AL.; DEFENDANTS.

[Filed June 5, 1985]

MEMORANDUM OF DECISION

Plaintiffs commenced this action in state court against the three named defendants and a variety of fictitious defendants seeking to recover for injuries allegedly inflicted upon plaintiff William T. Erwin, Sr. at his work place while an employee of the United States Government at the Anniston Army Depot. The three named defendants are alleged to be co-employees and/or supervisors. Defendant Westfall timely removed the entire action to this court and all three defendants have now filed a motion to dismiss, or in the alternative for summary judgment. Plaintiffs have filed an objection to the removal and to the dismissal, which objection the court treats as a motion to remand to the state court.

The motions came on for hearing at a scheduled motion docket held May 10, 1985. At the conclusion of the hearing counsel for plaintiffs requested the opportunity to submit a brief on the issues embodied in the motions. The

court gave counsel two weeks, which period at the request of counsel was twice extended, with the final deadline for briefs being June 3, 1985. The motions are now ripe for a decision thereon.

The motion for summary judgment is supported by affidavit and points out that the three named defendants were employees of the United States acting under color of their office and within the scope of their official duties at the time of the acts or omissions made the basis of the ordinary tort claims which are stated in the complaint. The affidavit of plaintiff William T. Erwin does not traverse the fact that the alleged tort was committed within the scope of defendants' jobs. Indeed, the Erwin affidavit almost admits that the acts or omissions of defendants took place at the work site of defendants and within the scope of their jobs. These three defendants are therefore absolutely immune from suit on account of the matters alleged in the complaint and the motion for summary judgment as to them will be granted by separate order. *Johns v. Pettibone Corp.*, 755 F.2d 1484 (11th Cir. 1985). Plaintiffs seek to avoid the effect of the holding in *Pettibone* by observing that *Pettibone* does not discuss discretionary, non-discretionary and ministerial functions. No such discussion was necessary. The law of the Eleventh Circuit is clear that absent an allegation of a tort of constitutional magnitude, any federal employee is entitled to absolute immunity for ordinary torts committed within the scope of their jobs. *Evans v. Wright*, 582 F.2d 20 (5th Cir. 1978).

Plaintiffs included in the complaint a variety of fictitious defendants and as to them the court will remand this action to the state court. The remand will be without prejudice to any defendant substituted for a fictitious defendant hereafter served removing the action to this court. In this regard, the court notes that it is entirely likely that any defendant substituted for fictitious defendants

No. 1 and No. 2 (and possibly other fictitious defendants) will also be immune as employees of the government acting within the scope or [*sic*] their official duties.

DONE this 5th day of June, 1985.

/s/ JAMES H. HANCOCK
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CV85-H-874-S

WILLIAM T. ERWIN, SR., AND EMELY ERWIN, PLAINTIFFS,

v.

RODNEY P. WESTFALL; OSBORN RUTLEDGE; WILLIAM BELL; ET AL.; DEFENDANTS.

[Filed June 5, 1985]

ORDER

In accordance with the Memorandum of Decision this day entered, it is

ORDERED, ADJUDGED and DECREED that the motion of defendants Rodney P. Westfall, Osborn Rutledge and William Bell for summary judgment in their favor is GRANTED and they are DISMISSED as defendants, with prejudice.

The claims of plaintiffs against all fictitious defendants are REMANDED to the Circuit Court of Jefferson County, Alabama, from whence they were removed. The clerk of court is directed to send a copy of this order to the clerk of such state court.

DONE this 5th day of June, 1985.

/s/ JAMES H. HANCOCK
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7437
D.C. Docket No. 85-0874

WILLIAM T. ERWIN, SR., AND EMELY ERWIN,
PLAINTIFFS-APPELLANTS,

v.

RODNEY P. WESTFALL, OSBORN RUTLEDGE,
WILLIAM BELL, ET AL., DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Northern District of Alabama

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Before JOHNSON and HATCHETT, Circuit Judges, and MURPHY*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

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*Honorable Harold L. Murphy, U.S. District Judge for the Northern District of Georgia, sitting by designation.

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 8, 1986
For the Court:
Spencer D. Mercer, Clerk

By: /s/ AARON A. GODFREY
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7437

WILLIAM T. ERWIN, SR., AND EMELY ERWIN,
PLAINTIFFS-APPELLANTS,

v.

RODNEY P. WESTFALL; OSBORN RUTLEDGE;
WILLIAM BELL; ET AL.; DEFENDANTS-APPELLEES.

Appeal from the United States District Court for
the Northern District of Alabama

[Filed June 2, 1986]

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion APRIL 8, 1986, 11 Cir., 198__, ____ F.2d ____). (JUNE 2, 1986)

Before JOHNSON and HATCHETT, Circuit Judges, and MURPHY*, U.S. District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

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*Honorable Harold L. Murphy, U.S. District Judge for the Northern District of Georgia, sitting by designation.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/FRANK M. JOHNSON JR.
United States Circuit Judge

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40043

OPPOSITION

BRIEF

No. 86-714 (2)

IN THE

Supreme Court Of The United States

October Term, 1986

RODNEY P. WESTFALL, ET AL.
Petitioners

v.

WILLIAM T. ERWIN, SR., AND EMELY ERWIN
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

R. BEN HOGAN*

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22 pp

QUESTIONS PRESENTED

1. Whether a conflict exists among the Circuit Courts of Appeal regarding application of the official immunity doctrine in a common law negligence case that justifies review by this Court.

2. Whether the Eleventh Circuit Court of Appeals, under the facts in this case correctly denied Petitioners' claim of official immunity.

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No. 86-714

IN THE

Supreme Court Of The United States

October Term, 1986

RODNEY P. WESTFALL, ET AL.
Petitioners

v.

WILLIAM T. ERWIN, SR., AND EMELY ERWIN
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

R. Ben Hogan, III, and M. Clay Alspaugh, on behalf of Respondents William T. Erwin, Sr., and Emely Erwin, oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in the case.

STATEMENT OF THE CASE

Respondents are satisfied with Petitioners Statement of the Case.

REASONS FOR DENYING THE WRIT

1. There does not exist among the Circuit Courts of Appeal conflicts regarding application of the official immunity doctrine in a common law negligence action that justifies review by this Court.

Though Petitioners have alleged that there is a conflict among the circuit courts of appeal that justify review by this Court, such is not the case. Though the various courts of appeals do, as argued by Petitioners, render different opinions concerning the application of the law, each is distinguishable on its facts and were correct applications of this Court's previous ruling in *Barr v. Matteo,* 360 U.S. 564 (1959). In *Poolman v. Nelson,* 802 F.2d 304 (8th Cir. 1986) cited by Petitioners at page 6, a misrepresentation case based upon communications between a county supervisor for the Farmers Home Administration (FmHA) and the plaintiff who applied for a loan with the Farmers Home Administration, the FmHA employee who allegedly made the representation was an official of policy making rank exercising that particular authority. The issue presented to the Eleventh Circuit in this case was not the issue upon which *Poolman* turned. Here the Petitioners are all of a status that do not involve policy making in order to govern, contrary to the Farmers Home Administration's employee in *Poolman.* In fact, in distinguishing the Eighth Circuit's opinion from the Eleventh, the court did not have to consider the question of immunity for a non-policy making official. Therefore, the Eighth Circuit in fact, has not spoken to the issues addressed by the Eleventh Circuit.

As has been pointed out by Petitioner, six Courts of Appeals, the Third, Fifth, Sixth, Tenth, Eleventh, and District of Columbia, hold that immunity from tort liability is available only to federal employees who perform "discretionary" activities; employees involved in ministerial or operational activities are not accorded any immunity. Petitioners have stated in brief that those Courts disagree among themselves with respect to the quantum of discretion that entitles an employee to immunity.

Assuming, arguendo, that the "quantum of discretion" is the issue, the general principle of immunity as challenged here is not effected. Since each case would have to necessarily be judged independently, i.e., the particular activities involved and whether or not that activity has any effect on governing, then there can be no iron-clad rule for application so as to justify involvement by this Court. As was stated by this Court in *Doe v. McMillan,* 412 U.S. 306 (1973) and interpreting *Barr, supra.,* the immunity conferred is not a "fixed, invariable rule of immunity," id. at 320, and that each case requires "a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh[s] the perhaps recurring harm to individual citizens" id. Only if the activity of the officials is such that lack of immunity would inhibit the fearless, vigorous, and effective administration of *policies* of government, should the immunity attach. *Barr,* 360 U.S. at 571. Thus, only if the policies of governing are effected, should official immunity apply.

As has been pointed out in brief by Petitioners, all of the Circuits have held, in interpreting *Barr,* and *Doe, supra.,* that immunity is limited in scope and only available should the function be involved with governing. Though Petitioners state that there is an increased frequency which plaintiffs are utilizing actions under the state tort law to challenge *official conduct of a federal employee* such is not the question. The conduct that is challenged is not official conduct, but conduct from which a duty or obligation grows toward the injured plaintiff and whether or not the actions that accompany that duty are those that tend to affect the job of governing or policy making. As was pointed out in *Martinez v. Shrock,* cert. denied, 430 U.S. 920 (1977), three justices of this Court reiterated the holding in *Barr* as follows:

> [T]his Court has recognized a very narrow category of judicially created absolute immunity for some federal officials. See, *Barr v. Matteo, supra.* However, such absolute immunity heretofore has only been applied to policy making officials; and nowhere has it been suggested that there

> is a judicially created unqualified immunity for government functionaries operating at respondent's level.[1]

The Petitioners recognized that there is no split of opinions among the Circuits, since there could be none, that all federal employees are not protected by immunity, and thus prays that this Court grant the Petition, extending in all cases, immunity to those who exercise "operational discretion". In analyzing the cases dealing with this, as has been more completely cited by Petitioners, invariably the courts of appeals have recognized the limitation of immunity in "operationally discretionary functions." As was stated by the Eleventh Circuit in *Johns v. Pettibone,* 769 F.2d 724, 727 (11th Cir. 1985):

> We have recently noted, however, that not every act which might literally be termed "discretionary" is sufficient to invoke the immunity doctrine. Indeed, "[I]n the strict sense, every action of a government employee, except perhaps a conditioned reflex action, involves the use of some degree of discretion."

As such, there is no, and should be no overriding consideration so as to grant to all employees involved in operations of government immunity from their common law torts.

2. The Eleventh Circuit correctly decided the issue of official immunity in this case.

As was pointed out by the Eleventh Circuit Court of Appeals (App. A-3) the two-prong test to apply in order to determine whether or not immunity attaches includes a determination as to whether or not the challenged conduct is a discretionary act and *is within the outer perimeter of the actor's line of duty.* As the court appropriately stated, contrary to the argument of Petitioners herein, on motion for summary judgment there were undisputed allegations of fact by the plaintiffs (Respon-

[1]In *Martinez,* Certiorari was denied to review the decision of the Third Circuit granting official immunity to two army surgeons for their acts of medical negligence holding that the policy of government to attract qualified physicians to government service would be inhibited if plaintiff's claim for medical negligence was allowed.

dents) which created a material question as to whether or not the activities of the government employees were "discretionary". The activities of the defendants herein, were activities involving day-to-day operation, not involving planning or policy consideration. As the Eleventh Circuit has held in other tort actions,[2] there were questions of fact presented at least establishing issues that the functions of these defendants were not such a discretionary function so as to, as a matter of law, entitle them to immunity.

CONCLUSION

For the foregoing reasons, Respondents would respectfully submit that the Petition for Writ of Certiorari be denied.

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[2]*Heathcoat v. Potts,* 790 F.2d 1540 (11th Cir. 1986); *Hendrix v. Patterson,* 779 F.2d 1056 (11th Cir.), (order without opinion); *Re-Hearing En Banc,* denied, 779 F.2d 60 (1985); *Johns v. Pettibone,* 769 F.2d 724 (11th Cir. 1985).